SUPREME COURT, U.S.
FILED
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JOSEPH J. PICKREL and
JAMES ROBERT PICKREL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where petitioners received excessive sentences based upon the higher Sentencing Guidelines for "D" methamphetamine rather than the much-lower Guidelines for "L" methamphetamine, were such petitioners denied their Sixth Amendment right to effective assistance of counsel, where (1) their counsel never mentioned to the sentencing court the considerable difference in the length of sentence imposed for "D" as opposed to "L" methamphetamine, much less put the government to its proof, if any it had, that the drugs involved were in fact "D" methamphetamine and, (2) the trial court sentenced the petitioners under the much higher guidelines for "D" methamphetamine without any mention of the "D"/"L" distinction, much less any evidence being offered to show that the drugs were in fact the more heavily punished "D" methamphetamine?

2. Where the government has destroyed the drugs involved prior to the time of the filing of a petition for relief under 28 U.S.C. § 2255, and thus the methamphetamine cannot be tested to determine whether it is "D" or "L" methamphetamine, or some combination thereof, is it Constitutionally appropriate for the Ninth Circuit to impose upon defendants the burden of showing that the drugs were in fact "L" and not "D" methamphetamine, in order to meet the *Strickland* requirement that there must be prejudice flowing from counsel's failure to put the government to its proof, if any it had, that the drugs involved were in fact the much-heavier sentenced "D" methamphetamine?

3. Should petitioners have been allowed the evidentiary hearing they requested of the district court in this habeas proceeding for the purpose of attempting to determine whether the drugs involved in their criminal case had in fact been the more severely punished "D" methamphetamine, as had been assumed without proof when they were sentenced in the underlying criminal case?

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PETITION FOR A WRIT OF CERTIORARI

Joseph Jay Pickrel and James Robert Pickrel (hereinafter "petitioners") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered in their consolidated appeal, which judgment affirmed the denial by the district court of their 28 U.S.C. § 2255 motions to either vacate sentences imposed by the United States District Court for the District of Oregon or, alternatively, to allow an evidentiary hearing to attempt to determine what drug had been involved in their criminal case and thus what was the correct sentence to have imposed.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-4a) and the district court (Pet. App. 5a-10a; 11a-12a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1997. [App. 1a.] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall . . . have Assistance of Counsel for his defence."

The United States Sentencing Guidelines effective in October, 1987,[1] provided separate Guideline ranges for two types of methamphetamine. The Drug Quantity Table [Appendix 13a-14a] in that edition of the Guidelines does not specifically mention methamphetamine, but the related Drug Equivalency Tables [Appendix 14a] reveal that "D"-methamphetamine, which is most active on the central nervous system, was treated much more severely than L-methamphetamine, a substance which acts on the peripheral nervous system. In that Drug Equivalency Table, one gram of methamphetamine was assigned an equivalency of 2.0 grams of cocaine, while one gram of L-methamphetamine was assigned the significantly lower drug equivalency of 0.2 grams of cocaine, one-tenth the amount, with commensurate reductions in applicable offense levels.[2]

STATEMENT

The court of appeals in this case held that petitioners' rights to effective assistance of counsel were not denied

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[1] Applicable guidelines are those in effect as of the date of the offense. *United States v. Kussmaul*, 987 F.2d 345 (6th Cir. 1993). *See also, United States v. Castro*, 972 F.2d 1107 (9th Cir. 1992).

[2] As of November 1, 1995, the distinction between methamphetamine types has been eliminated for the purpose of determining sentencing. Sentencing Guidelines Amendment 518.

when, after entering pleas of guilty, they received much-larger sentences under the guideline for "D" methamphetamine rather than the lower guideline applicable to "L" methamphetamine, even though (1) the indictment to which they pleaded guilty did not allege the more-heavily punished "D" methamphetamine (it was silent as to the type), (2) defense counsel did not ever test the drugs involved despite having been given the opportunity to do so, (3) counsel did not mention the vast sentencing difference at the sentencing hearing, much less request that the government prove that the substance was in fact "D" methamphetamine, (4) the government offered no proof at sentencing that the drugs involved were in fact "D" as opposed to "L" methamphetamine, (5) by the time that petitioners filed their ineffective assistance of counsel claims (after their direct appeal, in which the "D" vs. "L" issue was not raised, and thus lost) the government had destroyed the drugs involved, and (6) the district court hearing this claim and refused to hold a hearing to make a determination of whether the drugs involved were in fact "D" or "L" methamphetamine. Petitioner seeks review of this refusal.

The facts underlying the Sixth Amendment claim are set forth in the opinions below. Petitioners, who are brothers, were indicted for conspiracy to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. [App. 2a.] The indictment was silent as to the type of methamphetamine. [App. 2a.] Petitioners pleaded guilty on October 29, 1990 [App. 5a]; once again, there was no reference to the type of methamphetamine. Petitioner Joe Pickrel received a sentence of 240 months, the sentence applicable for "D" methamphetamine, rather than the applicable sentence for "the less severely punished l-methamphetamine." [App. 3a.] Petitioner James Pickrel received a sentence of 160 months, the sentence applicable for "D" methamphetamine, rather than the applicable sentence for "the less severely punished l-methamphetamine." [App. 3a.]

Counsel for both petitioners failed to object at sentencing to the government's characterization of the methamphetamine as type "D." [App. 7a.] The same counsel also "did not preserve this issue for appeal." [App. 7a.] The drugs were destroyed after the sentence was imposed, leading the District Court in the later-filed habeas proceeding brought under 28 U.S.C. § 2255, to conclude, "[A]bsent evidence to back up his claim, he has failed to show prejudice and is not entitled to relief." [App. 9a.] The district court thus denied the ineffective assistance of counsel claim and refused to hold a hearing.

On appeal of the district court's denial of the section 2255 claims, the Court of Appeals noted that the original sentencing court rendered its sentences not on proof, but rather on the "*assumption* that the Pickrel's offense involved d-methamphetamine rather than the less severely punished l-methamphetamine." (Emphasis supplied) [App. 3a.] After observing also that "nothing in the record suggests that l-methamphetamine was actually involved," [App. 3a] the court affirmed the lower court's denial of the ineffective assistance of counsel claim by citing the Ninth Circuit law to the effect that a "failure to raise Sentencing Guidelines distinction between D-methamphetamine rather than l-methamphetamine [is] not ineffective assistance. . . ." [App. 3a.]

REASONS FOR GRANTING THE PETITION

There is a conflict among the Circuits on the exact point involved in this case. The Ninth Circuit has a long line of cases (mostly unreported and many brought *in propria persona*) holding that the failure of defense counsel to point out at sentencing the substantial sentencing differ ence between the two types of methamphetamine is not ineffective assistance of counsel[3] *even if* everyone in-

[3] The longstanding test for ineffective assistance of counsel is stated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

volved (defense counsel, the prosecutor and the sentencing judge) was asleep at the switch while reading the Presentence Report, at the sentencing itself, and during the direct appeal; *and* even where the drugs involved cannot later be found for testing. *See, e.g., United States v. McMullen*, 98 F.3d 1155 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2444 (1997). Conversely, the Tenth Circuit has ruled that the same circumstances do result in ineffective assistance of counsel. *United States v. Glover*, 97 F.3d 1345 (10th Cir. 1996). As shown below, the Tenth Circuit law on this point is correct and much more consistent with our Constitutionally mandated requirement of effective counsel.

The Sentencing Guidelines are the engine which runs the ever-expanding train which is this nation's criminal justice system. The Guidelines are the sentencing map which imposes very long sentences in a mechanistic way. The cost is longer dockets (because there are fewer pleas) and a greater need for prison space. The stated benefit is *uniformity* in sentencing. The goal of such uniformity requires this court to resolve this conflict between the circuits.

The Sentencing Guidelines Manual is easy to read. There is absolutely no reason for the federal courts of this country to tolerate the lapse which occurred in this case. This is important, not peripheral. As the sentencing court in this very case expressed the impact of these Guidelines:

> It's a fairly—you know—it's a very difficult thing for the court to impose this amount of time on anybody. The fact of the matter is, you'll be doing more time than the average person who commits murder

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L.Ed.2d 674 (1984). *Strickland* requires a showing that trial counsel's representation fell below an objective standard of reasonableness and that the defendant suffered prejudice, in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different.

> in this state, which is incredible. [Court of Appeals App. No. 6.] [App. 15a.]

The prosecutor in this case called the sentence "horrific." [App. 15a.] One can only imagine how petitioner and his family must have been characterizing this long sentence as they heard it pronounced, yet through it all, defense counsel did not even think to look at the Guidelines manual which would have easily shown him a way to attempt to lessen this "horrific" result. If this country chooses to impose such long sentences by use of a grid, counsel should be charged with reading that grid, which requires no more skill than reading a map.

This issue is likely to recur. There are many similar contexts where sentences are greatly enhanced by the existence or non-existence of readily determinable facts. Some examples are the presence of crack or base cocaine versus regular cocaine; working versus non-working firearm; use of firearm versus non-use of firearm; vulnerable versus non-vulnerable victim. The existence or non-existence of such facts, and many more like them, create vast swings in the sentences imposed. This Court can, by granting this petition, assure that counsel, or the court, or the prosecutor read the simple grids relevant to the case at hand. We do not tolerate counsel sleeping during trial. Yet he or she may as well be asleep if they will not read the easy grid on a point where the sentence difference is, as the district court stated in this very case, "severe." [App. 5a.] No one is harmed by a decision which assures that the centrally important guideline provisions will be read by someone.

I. THE NINTH CIRCUIT REASONING IS FLAWED; THE TENTH CIRCUIT REASONING CORRECTLY CAPTURES THE REQUIREMENTS OF *STRICKLAND v. WASHINGTON*

The Ninth Circuit

Like every other circuit that has ruled on the matter, the Ninth Circuit has held that, if challenged at sentencing

and followed through on *direct appeal,* a sentence must be vacated if it was imposed on the assumption that the substance at issue was "D" rather than "L" methamphetamine. There must be proof by the government that the substance was in fact the more severely punishable "D" methamphetamine. *See, e.g., United States v. Dudden,* 65 F.3d 1461, 1472 (9th Cir. 1995) (". . . it was not the defense's burden to show that the drug was L-methamphetamine. It was the government's burden to produce evidence that the more potent D-methamphetamine was involved.") This is the rule in all circuits where the issue has arisen. *See, e.g., United States v. Patrick,* 983 F.2d 206 (11th Cir. 1993). These cases simply follow the general rule that when a court imposes a sentence based upon certain facts, the government generally has the burden of proving those facts. *See, McMillan v. Pennsylvania,* 477 U.S. 79, 91-92, 106 S. Ct. 2411, 2418-19, 91 L.Ed. 2d 67 (1986).

Yet the Ninth Circuit[4] turns the tables dramatically in the context of *habeas* relief. When the considerable sentencing difference between "D" and "L" methamphetamine is not mentioned at sentencing by the defense attorney or anyone else, *and* the sentencing court maks an *"assumption"* [App. 3a] that the more severely punished "D" methamphetamine is involved, the Ninth Circuit does not consider this to be substandard conduct, much less prejudicial. *McMullen, supra,* 98 F.3d, at 1158.

To explain why the failure of counsel at sentencing to note the substantial sentencing difference and to demand the required proof of "D" isomers rather than "L" isomers is not "substandard" performance within the meaning of the first prong of the *Strickland* test, the Ninth Circuit panel in *McMullen* reasoned, and has since adhered to

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[4] Several other circuits are in accord with *McMullen,* but their reasoning is the same and thus similarly flawed. *See, e.g., Reece v. United States,* 119 F.3d 1462 (11th Cir. 1997); *United States v. Apfel,* 97 F.3d 1074 (8th Cir. 1996).

such reasoning in a long line of cases, that such a failure does not fall "below prevailing professional standards." *McMullen, supra*, 98 F.2d at 1158.[5]

As to why such failure does not prejudice the defendant (the second prong of the *Strickland* test), the Ninth Circuit simply states that unless the defendant comes in to court with something other than his assertion that the drugs were the lesser-punished "L" methamphetamine, he has not shown prejudice and thus is not entitled to relief, even if that relief takes the simple form of holding a hearing to determine whether the government can meet its burden of proving that the drugs are "D" rather than "L" methamphetamine. *McMullen* advances no reason why such a simple and illuminating hearing should not be held.

The Ninth Circuit law here sets an embarrassingly low standard (lawyers do not have to read the manual) and imposes a "Catch-22" burden on habeas petitioners: your lawyer did not attend to the obvious business of requiring proof of a major enhancement, but now that you have been made aware of the proof requirement, it is too late to hold any hearing on that requirement.

The Tenth Circuit

The Tenth Circuit holds just the opposite in *United States v. Glover, supra*, 97 F.3d 1345. In a reasoned approach, the Tenth Circuit concludes, based on the very

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[5] In coming to the extraordinary conclusion that the failure of an attorney to read the Sentencing Guidelines Manual is not substandard, the *McMullen* panel noted (98 F.3d at 1158) that the government had offered anecdotal evidence of 10 other cases where counsel failed to note the vast difference between "D" and "L" methamphetamine and used this as a basis for setting the terribly low standard of performance. Clearly, lawyers should be held to the responsibility of reading the manual, something really no more difficult than the reading of a manual to assist in assembling children's toys at the holiday season.

same circumstances as are involved in this case[6] and in the Ninth Circuit case of *McMullen,* that substandard performance and prejudice were demonstrated under the *Strickland* test.

As to whether the lapse of counsel is substandard, the Tenth Circuit observed that the "D" versus "L" distinction was "clearly meritorious under existing Guidelines and elementary burden-of-proof principles, surely both matters within the requisite expertise of a practicing member of the criminal defense bar." *Glover,* 97 F.3d at 1349. This surely is or ought to be the standard generally and even more so in relation to the all-controlling and easily-read Sentencing Guideline Manual. It simply disgraces standards generally to label as acceptable the performance of a lawyer who does not even read the manual. That other lawyers present, the prosecutors and the judge did not intervene or themselves raise and dispose of the sentencing distinction set forth in the Guidelines Manual, does not excuse the lawyer's performance, much less insulate it from the label "substandard". The other professionals present had their own responsibilities and were not "duty bound to pursue [the issue] with profession zeal." *Id.,* at 1350. Indeed, their failure to intervene assures the lapse, allows the imposition (without any attempt at a factual basis) of the much-higher sentence, thus generating the prejudice.

It is prejudicial to let stand a sentence based upon an assumption. *Glover,* 97 F.3d at 1350. This is particularly so where all that is required is a remand for hearing on the issue. *Glover* points out that, at such hearing, the district court can consider not only direct evidence of the presence of "D" methamphetamine in the drugs involved, but, if this is no longer available, the court can consider an array of circumstantial evidence on the matter. *Glover,*

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[6] In *Glover,* "the defense counsel did not invoke, the district court did not enforce, and the prosecution did not satisfy, the government's burden of proof regarding the type of methamphetamine upon which his sentence was based." *Id.,* 97 F.2d at 1348.

97 F.3d at 1350, note 5. In these circumstances, a holding that a criminal defendant is not prejudiced requires an Alice-in-Wonderland-like reasoning to this effect: "As a defendant, you can insist that the government prove the sentencing enhancement; but if your lawyer forgets this right or has not read the manual to learn of it, you lose that right and later you must prove the type of drug involved *even if* the government, which has been relieved of its burden, has now destroyed the only way in which you can prove the matter. Incidently, we also will not give you a hearing at which you can attempt such proof."

Glover should be the rule.

II. GLOVER IS SOUND WHEREAS McMULLEN IS UNFAIR AND INVITES FUTURE MISTAKES

Strickland itself commands that the ultimate test for relief is not formalistic:

> In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of a particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696, 104 S.Ct. 674 (1984). Surely, such breakdown has occurred when, as *Glover* aptly described it, "the defense counsel did not invoke, the district court did not enforce, and the prosecution did not satisfy, the government's burden of proof regarding the type of methamphetamine upon which his sentence was based." *Id.* 97 F.2d at 1348. The Second Circuit has, using the *Strickland* language quoted further above, ruled that counsel who falls asleep can not be said to have been effective. *Tippens v. Walker,* 77 F.3d 682 (2nd Cir. 1996). If *McMullen* rather than *Glover* is to be the nationwide standard, counsel, at least at sentencing hearings, may just as well go back to sleep. After all, a sentencing hearing *is* the Guidelines Manual and a debate over its many enhancements and reductions. That debate did not take place in this case.

If *McMullen* stands, it outlasts the "D" versus "L" controversy and affects determinations relating to virtually every other enhancement and reduction. Our national standards should be higher than *McMullen* would allow. The Tenth Circuit has not been shown to have suffered by insisting that counsel appearing in its courts read and understand the applicable Sentencing Manual provisions. Were *Glover* the national rule, not only would defense counsel more likely remain awake to the issue involved, the court and the prosecutor would step in if defense counsel did not, just as they frequently do in other phases of the criminal proceeding, in order to protect the record, while at the same time giving the defendant his due.

A remand for a hearing in this case on the "D"/"L" issue would promote such courtroom-wide vigilance, not to mention the insistence of fairness which undergirds *Strickland*. At such a hearing, the government should have the burden. Burdens should not shift because defense counsel fails in his job.

CONCLUSION

The petition for a *writ of certiorari* should be granted.

Respectfully submitted,

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